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The Place and Function of Pure Equity in the Structure of Law

By RALPH A. NEWMAN*

The Various Meanings of Equity

Among the many anomalies of equity, one which has frequently attracted the attention of students of comparative law is the fact that in the civil law countries, in which equity has been almost completely absorbed into the general body of the law, there is no branch of the law called equity; there are no courses in equity given in the universities, and the very concept of equity is unfamiliar to most civilian lawyers.¹ The confused approach to equity in the United States is indicated by the fact that in many law schools there is no separate course in equity; in other schools, equity is taught as a separate course of comparable status with other traditional courses such as contracts, property and torts, and in some schools equity is looked upon as a part of the course in judicial remedies. These different approaches to the teaching of equity reflect our attitude toward it as an indefinite area of law which is doubtless of great importance, but which is annoyingly elusive to the grasp. Whichever approach is adopted, the student is apt to carry away a conception of equity as a body of rules, many of them obviously different from and often in direct contradiction to those he studies in other courses, but he is left without any clear idea as to why the rules are different, or as to when they should or should not be applied.

In Anglo-American law, equity is commonly looked upon as a component of law which is relevant primarily in suits for specific relief, and irrelevant in most actions for damages. From this view of equity the feeling has developed that equitable principles come into operation because specific relief is sought, reversing the true relationship between the substantive principles of equity, and remedies, which is

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that specific relief is granted in order to implement equitable objectives more effectively. Uncertainty exists not only as to the nature of the relationship between law and equity but also as to the nature of equity itself, and the word “equity” has become a hollow word largely devoid of specific content. Not the least important reason for the prevailing uncertainty as to the relationship between law and equity is the fact that equity is generally taught as a separate course, which has the tendency to place it apart from the rest of the law. As Professor Lawson has expressed the thought, “a body of law taught for many generations creates inhibitions in lawyers who have passed through a traditional education in it. It forms a conceptual structure of legal thought from which lawyers escape only with difficulty.”

An important reason for the uncertainty as to the nature of equity is the fact that the word “equity” is used in seven different senses; in the sense of what is fair and just, in the sense of natural law, in the sense of what is fair and just, the sense of natural law, and so on...
the sense of a system of law which corrects failures of justice in the main body of the law,\(^5\) in the sense of a theory of justice in which the operation of legal precepts is adjusted to the exigencies of special circumstances,\(^8\) in the sense of a body of law which was administered in the English Court of Chancery when it was a separate court,\(^7\) in the sense, in civil law, of a method of liberal interpretation of code provisions in accordance with the spirit and general purpose of the statute,\(^8\) and, in Anglo-American law, in the sense of a body of legal precepts which introduce into the law, in suits for specific relief, criteria of justice which are based on higher ethical values than those which are ordinarily required in actions for damages.\(^9\)

An Analysis of the Different Meanings of the Word "Equity"

In the general sense of what is fair and just, equity is virtually synonymous with law, since the purpose of all law is to do justice as it is envisaged at the place and time. Natural law provides only a pseudo-solution of the problem of the nature of equity. The laws of nature are equated with justice, but the necessity of discovering the laws of nature through reason merely remits us to the original problem of what is fair and just. The distinction between natural law and equity has never been clearly drawn; in some civil codes natural law,\(^10\) in others, equity,\(^11\) is referred to as the source for filling gaps in the posi-

\(^5\) Aristotle, Nicomachean Ethics Bk. 5, c. 10; St. Germain, Doctor and Student Dial. 1, ch. 16 (1530).

\(^6\) "All legal experience shows that the power of adjusting the operation of legal precepts to the exigencies of special circumstances is unavoidable if there is to be a complete system of justice under law." Pound, Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case, 35 N.Y.U.L. Rev. 925, 936 (1960). Equity is "la giustizia del caso singelo" (the justice of the single case). Dushi, Istituzioni de diritto civile 49 (2d ed. 1930). See also Dessens, Essai sur la notion d'équité 5-6 (1934).

\(^7\) Maitland, Equity 1 (2d ed. 1936).

\(^8\) Del Vecchio, Philosophy of Law 282 (8th ed. 1952). There are references to "equity" in several articles of the Italian Civil Code, arts. 1374, 1450, 1467, 1469, 1651, 1660, 1664, 1733, 1736, 1751, 1755, 2045, 2047, 2056, 2109, 2110, 2118, 2120.

\(^9\) 2 Kent, Commentaries 826 (14th ed. 1896).

\(^10\) Argentine Civil Code art. 16; Austrian Civil Code art. 7; Avant-project, French Civil Code art. 21; Constituent Assembly Law of Ghana art. 4.

\(^11\) The Egyptian Code art. 4, provides for "equity and justice" (1948). The codes of Colombia, Equador, and Honduras, infra, provide for "natural equity." The Chinese Civil Code art. 1, the Italian Civil Code art. 12, the Portuguese Civil Code art. 16, and the Spanish Civil Code art. 6 provide for "the general principles of law" (in the Italian Civil Code the reference is to "the general principles of law of the legal system of the State") (the provision in the Spanish Civil Code derives
tive law. Natural law is primarily concerned with the relationship between the state and the individual, centering about the problem of the rights of man; and in private law the concepts of natural law are so general as hardly to provide a guide to justice.

As to the theory that the function of equity is to correct failures of justice resulting from the operation of the rules of strict law, it is meaningless, since moral considerations are no longer deemed irrelevant, to continue to talk and think of part of the law continuing to tolerate failures of justice which require correction by another part;\(^\text{12}\) although it is difficult to explain the dual standard of morality in Anglo-American law on any other ground. In the sense of a system of legal norms which are sufficiently flexible to lend themselves to adjustment to the facts of each case, it seems clear that, although the nature of equitable norms is such that they are susceptible of more flexible application than many norms of common law, there are many other common law concepts, for example causation, due care, reasonable time for the performance of obligations, and reasonable use of property, which are applied with considerable flexibility.\(^\text{13}\) Accordingly it can hardly be said that this characteristic is the exclusive province of equity. Maitland's often quoted definition of equity as a body of law originally applied in the English Court of Chancery when it was a separate court\(^\text{14}\) is merely an identification rather than an explanation, and was obviously not intended as a serious definition. The theory of equity as a liberal interpretation of codes to reach the spirit of the statute merely raises the problem of the nature of equity and does not provide an answer, since the process goes, of necessity, beyond the ordinary meaning of interpretation. The last sense in which the word "equity" is used—to describe a body of juridical criteria which are applied in suits for specific relief and which are based on a system of more elevated moral values than the criteria which are ordinarily applied in actions for damages—is a fairly accurate description of equity in Anglo-American law, but does not indicate the effect of equity in some areas of our inner common law system or throughout


\(^{13}\) Amos, Some Reflections on the Philosophy of Law, 3 CAMB. L. J. 31, 36 (1929).

\(^{14}\) MAITLAND, op. cit. supra note 7, at 1.
the civil law. This description is not, moreover, completely accurate even as to the nature of Anglo-American equity, since the juridical criteria referred to in the definition are merely manifestations of a force by which the law becomes humanized in conformity with advancing standards of individual and social morality. None of the customary usages of the term "equity" indicates the existence of any qualities which distinguish equity, elsewhere than in the inner system of equity in Anglo-American law, from law itself.

That equitable principles exist, we know from their presence in Anglo-American equity and from their earlier presence, in more general form, in Roman law. In Anglo-American common law there are some areas in which the principles of equity are openly recognized, but this is not so in other areas in which their presence is equally certain. When the principles of equity have become completely integrated into the common law norms of Anglo-American law or into the norms of the civil law, they cease to be apparent because they lose, under such circumstances, their separate identity. In order for us to find out whether or not the principles of equity exist in some areas of Anglo-American common law, or in the civil law, we must first determine their precise nature by an analysis of Anglo-American equity; and then, by comparing them with the norms of Anglo-American common law and the norms of the various civil law systems, ascertain whether, or the extent to which, they have entered into the norms of those systems, including our inner common law system. We can then determine, on the basis of the results of their application in those systems, the question of whether their further acceptance in those systems would be desirable. The principles which will be identified in this manner might be termed principles of pure equity, as distinguished from equity in the general sense of what is fair and just. It is not the purpose of this paper to examine in detail the principles of equity or their application in different legal systems, which the writer has attempted to do elsewhere.\textsuperscript{15} What will rather be attempted is to examine the general nature of equity, the relationship of equity to law, and the place and function of equity in the structure of law as a whole.

A Glance at the History of the Evolution of Equity

Since the flowering of Greek philosophic thought in the fifth and fourth centuries of the pre-Christian era, men have perceived that law is composed of two conflicting forces, which at times and in some parts

of the world have become almost completely reconciled, and at other
times and in other places have carved out for themselves independent
channels in the jurisprudence of many legal systems. For many ages
these forces have been called strict law and equity, which Aristotle
defined as the correction of law when the law is defective owing to its
universality. In the early stages of legal evolution the cleavage be-
tween law and equity was clear and unyielding, and reconciliation
between the two forces was impossible. Early law is composed of rules
based on common elements of frequently recurring situations which
often differ widely from each other in important respects, even though
the cases are of a generally similar nature. The rules leave little room
for modification to meet the needs of particular cases. Cases are fitted
to the rules by eliminating factors which vary from the typical situa-
tions for which the rules are designed, especially factors involving
moral considerations, which the rules deem irrelevant. In this early
stage of legal evolution the rules of law frequently operate at the
sacrifice of individual justice, since the primary concern of early
law is the maintenance of public order rather than the attainment of
just results in each case. In Chinese customary law it was a criminal
offense to do the wrong thing or to fail to do the right thing, and as
late as 1728 the great T'sing Code consisted almost entirely of rules of
criminal law. The Siete Partidas, the thirteenth century code of law
of Spain, provided that "laws should not be made on matters that
seldom occur." Change in the rules of law is difficult because of the
divine origin of law and the sacred nature of the lawgiver.

Ethical advances in the law originate outside the established legal

16 Aristotle, Nicomachean Ethics Bk. 5, c. 10. The literal translation of
Aristotle's term for equity, "ἐμπιστευεία," is "clemency." "Aequitas" in Roman law meant
"equality," Del Vecchio, Philosophy of Law 282 (8th ed. 1952). Even before
Aristotle, Plato had written that "the differences of men and actions, and the endless
irregular movements of human beings, do not admit of any universal and simple rule." Plato, Works 529a (Jowett transl. 1937). For the meaning of "equitas" in Italian
law see text accompanying note 8 supra.

17 Even as late as the middle of the nineteenth century, according to Holdsworth,
"the pursuit of the logical conception was carried out regardless of the consequences
to the parties, with the result that its victory entailed, in a very large number of cases,
the sacrifice of substantial justice." 9 Holdsworth, History of English Law 393
(1926).

19 Siete Partidas, Part VII, last law (1263) (Scott transl. 1931) (the thirteenth
century code of Spain).


21 "In early times the judge was also a priest or soothsayer, who sought aid and
order, and relief from the harsh effects of the rules of law in particular
cases must come from a source external to the law itself. Individual
justice is attained through royal dispensation, and we see the begin-
nings of equity in Solomon’s prayer for an understanding heart to judge
his people; we are not told that he prayed for knowledge of the law.
In some parts of the world the exercise of the royal prerogative of
clemency was delegated to royal officials, as occurred in early English
history when the Chancellor of the Curia Regis became the keeper
of the King’s conscience. With the accumulation of precedents, equity
in many countries developed into a system of law based upon definite
principles. In the third century before the Christian era in Rome, and
in England in the twelfth century, equity cast aside its character of
executive clemency and became a part of the legal system. During a
great part of legal history, equity and law in many parts of the world
constitute parallel streams in the total jurisprudence. This was the
case in Roman law until early in the reign of Hadrian, in canon law
until the fourteenth century, and in biblical law, Frankish law

22 “In the thirteenth century we find St. Louis administering justice under an oak
at Vincennes, and calling himself the fountain of justice.” DUche, L’Histoire de France
171 (1954). At about the same period we find, by a curious coincidence of history,
Henry II following the same process in the Great Hall of Westminster, and at the
opposite end of the earth, the possibly mythical Emperor Shun administering justice
under a pear tree.

23 1 Kings 3:9.

24 Shortly before 129 A.D., see LENEL, Das Edictum Perpetuum (3d ed. 1927);
Pringsheim, The Legal Policy and the Reforms of Hadrian, 24 J. Roman Studies 141,
143 (1934).

25 Until the beginning of the fourteenth century, canon law was administered at
the Episcopal See at Rome in two courts: the Signatura Justitiae and the Signatura
Gratiae. Equity was an extraordinary remedy, S.R.R. Decisiones, Rome, tome 5, 193; see
LEfEBVRE, Le Role de l’equite en droit canonique, 7 Ephemerides Iuris Canonici (Italy)
137, 151 (1951). In the fourteenth century a series of Papal decrets brought
the adoption of the function of relief in cases of extreme hardship, until that time adminis-
tered in the Signatura Gratiae, into the system of law administered in the Signatura
Justitiae. The signaturae of the Roman Curia were not duplicated in the diocesan curiae.
See also LEFEBVRE, Recours à l’office du juge, Dictionnaire de Droit Canonique
(France) fas. xxxi, col. 208 (1954).

26 In biblical law there were two systems, the levitical law and the doctrine of
lifnim mi-shuras ha-din, meaning literally “beyond the line of the law.” This doctrine
required, in both biblical and post-biblical times, the application of less technical rules.
The 613 biblical commandments of the Pentatuch were rigorously applied, but the
rabbinic elaborations upon them, although equally binding, were given in cases of doubt
a more lenient interpretation. See 2 Moore, Judaism 139-146 (1927).

27 Toward the end of the eighth century there was for a time a separation of
Frankish law from Konigsrecht, BRUNNER, Das Deutschen Rechts Geschichte 528
(1892). This separation may have been due to the fact that the Frankish period was
“the flourishing period of . . . symbolism.” HEUSLER, 1 Institutions of Germanic
Private Law 70, 74, quoted in 9 Wigmore, Evidence § 2405 (3d ed. 1940).
and medieval Spanish law. In English law, equity and common law constituted a single system from the early part of the twelfth century until the middle of the fourteenth, when the legal system split asunder, and for the next five centuries equity and law flowed in separate channels.

In most parts of the world, equity and law ultimately merged into unitary legal systems in which the principles of equity were integrated into the main body of the law; but always the clashing objectives of certainty and ideal justice have prevented a complete integration. There remain even in such integrated systems of law areas in which the acceptance of equitable principles is far from complete. As Piero Calamandri has expressed it, there are “open windows of the Palace of Reason, through which, despite the best laid plans, the wind of irrationality blows.” In closed civil law systems such as the French legal system, where there is no formal opportunity for the reception of equitable doctrine not already forming part of the code norms, the reception of equitable doctrine must be achieved clandestinely, giving rise to great difficulty in ethical growth. Pound not long before his death pointed out that the capital problem of the science of law today is to establish an equilibrium between the competing objectives of certainty and ideal justice; how to find, as he put it, “the right place for discretion, dispensation and mitigation in a system of administration of justice in the unified world of tomorrow.”

Pound has pointed out five stages in the evolution of law: primitive

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28 Las Siete Partidas, op. cit. supra note 19, at Part III, tit. 4, law 23. A distinction existed in medieval Spanish law between arbitrators of law and amicable compounders, “amigables componedores,” who were to decide the controversy in any way they deemed proper.

29 In the twelfth century equity and common law constituted a single system, Adams, The Origin of English Equity, 16 Colum. L. Rev. 87 (1916). Professor Adams is of the opinion that equity did not appear as a separate system until the fourteenth century, by which time the common law had become relatively inflexible. Glanvil, Bk. 7, c. 1 seems to support this view; and see Bracton, Note Book (1235-36) n.3.

30 See Bonassies, review of Newman, Equity and Law: A Comparative Study, 60 Rev. internationale de droit compare (France) 822 (1962); Newman, La funzione della pura equita nel diritto moderno, 40 Rev. internazionale di filosofia del diritto (Italy) 647, nn. 10-16 (1963). In Italian law the right to rescission does not continue if the plaintiff has performed. Italian Civil Code art. 1458. In Hungarian law rescission on the ground of economic impossibility is allowed only if the other party would have received a disproportionately high profit, M.D. (Maganjogi Dontoventyar, Collection of Decisions of Civil Law Cases), Case No. 3182/1933. As to the limited application of the doctrine of frustration in Spanish Law, see Sentencia March 25, 1912, cited in 2 Brutau, Fundamentos de Derecho Civil 374 (1954).

31 Calamandri, op. cit. supra note 21, at 21.

law, which is concerned only with maintaining peace; strict law, in which the interest shifts to stability of the economic order, and a characteristic of which is a refusal to take account of the moral aspect of situations or transactions; equity and natural law, in which the doctrines of equity mitigate the harsh effects of the rules of strict law, and in which concern is directed primarily to individual rights; the maturity of law, in which the relaxations of the strict law take form in definite legal norms; and finally the still evolving contemporary stage of what Pound has called the socialization of law, in which emphasis is being gradually transferred from individual interests to social interests.  

Pound's description of the evolution of law clearly reveals that the ethical progress of the law has been largely charted by the principles of equity. In primitive law, equity has no place. In the second stage, that of strict law, equity exists apart from law. In the third stage equity constitutes an auxiliary system of administration of justice. In the fourth stage the principles of equity combine, in most legal systems, with the principles of strict law. Examples of such integrated norms in the civil law are the doctrines of relief for unilateral mistake in contracting, and of condemnation of conduct consisting of varying degrees of cunning which fall short of actual fraud as defined in the common law. In the contemporary stage of legal evolution the norms of law frequently provide for a sharing, between the participants in the occurrence or transaction, or even by the whole community, of the responsibility for the results of misfortune to one of the participants. The fundamental principles of equity have expanded to include what Pound has called "the humanitarian idea . . . of lifting or shifting burdens and losses . . . so as to put them upon those better able to bear them." He has noted "the tendency to insist, not as was the view of legal writers in the nineteenth century, that the debtor keep faith in all cases even though it ruin him and his family, but that the creditor also must take a risk, either along with, or in some cases instead of, the debtor." Law is coming more and more to recognize, under the influence of equity, the social interest in the individual life. In view of the immense influence of equity on the development of law, it is of the utmost importance that we should be able to identify the areas in which the principles of equity are relevant, and to understand the reasons for their absence in other areas.

Aristotle's definition of equity as the correction of law when the

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34 Pound, Promise or Bargain?, 33 Tul. L. Rev. 455, 457 (1959).
35 POUND, AN INTRODUCTION TO THE PHILOSOPHY OF THE LAW 162 (1921).
law is defective owing to its universality was accurate in a stage of legal evolution when the rules of law were based on the common elements of typical situations, and when the forms of law were identified with law itself. Now that law is no longer sacred and unchangeable, there is no further need to resort to forces outside the law in order to correct instances of failure of justice. The rules of law open to receive the doctrines of equity, and the correction of law comes about within the law itself. At this stage in the evolution of law there is no longer need for an equitable system separate from the main body of the law. Equity loses its separate identity; equity and law coalesce, and equity becomes an integral part of a unitary legal system. The most perfect expression of this stage in the evolution of law is the civil law, in which there is only one set of norms, designed, so far as public order and the social interest in the stability of transactions do not forbid, to provide for just solutions of all situations which may arise. This union of law and equity has not yet been reached in Anglo-American law, in which the long experience of administration of equity in a separate inner judicial system has created a moral curtain, now heavy with the mold of centuries, which hangs across our law, shutting off the principles of equity from the greater part of the law.

The Sense of Justice

A comparison of legal systems from the viewpoint of their equitable content reveals that the fundamental principles of equity in almost all legal systems exhibit a striking similarity. The most probable explanation of this phenomenon would seem to be that equity is founded on a sense of justice which is innate in human nature, however diverse may be the explanations of its presence. Henri Bergson explains the sense of justice on two grounds; on the ground of a biological compulsion to promote the interests of the social group, and on the ground of deliberate choice, which is the unique privilege of human beings, of ends which conduce to the most effective fulfillment of social goals.

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36 I have attempted to explore this phenomenon in *The Role of Equity in the Harmonization of Legal Systems*, 13 Am. U.L. Rev. 1, 12-17 (1963); in *La Funzione della pura equità nel diritto moderno*, 40 Rev. Internazionale di Filosofia del Diritto Moderno (Italy) 647 (1963); and in *La Nature de l'équité en droit civil*, 60 Rev. Internationale de Droit Comparé (France) 289 (1964).


These objectives, which correspond at the human level of evolution to the objective of survival of the species in the animal world, require for the attainment of social goals the practice of an altruistic concern for one's fellow men. Whatever may be the origin of this basic impulse of human nature, a comparison of the evolution of law in different societies brings us to the irresistible conclusion that the goals of society, and therefore the goals of law, tend to approach one another among peoples in corresponding stages of social development. There is, therefore, good reason to believe that the sense of justice is deeply grounded in instincts which are common to all humanity. If this is so, the principles of equity might constitute an important link between legal systems by identifying the common source of innumerable mutations which obscure what may prove to be an essential similarity between them. For many centuries the true nature of equity has remained hidden behind the diverse facades of legal systems. The nature of equity has been clarified by Kent, Story, Pomeroy and the Harvard school of equity—Langdell, Ames, Chafee and Pound—but the relationship of equity to law is still not always clearly understood, and the areas of law in which the principles of equity are relevant remain badly defined. If law is to be harmonized across national boundaries on the basis of the equitable content of legal systems, we must understand fully the nature of the equitable norms by which the similarity of legal systems may be tested.

The Nature of Pure Equity

The difficulty of definition to which reference has already been made arises from the fact that equity is neither separate from, nor is it identical with law. Thought does not survive without symbolic concepts, and equity is a symbol of the need, originating in deeply seated impulses of human nature, for a system of justice based on standards of decent and honorable conduct which have been completely accepted in religion, ethics, and morals, but which in earlier periods of legal history were not deemed to fall within the province of law and which have not yet gained complete acceptance in law. Central in the commitments of a moral society is the concept of human brotherhood, from which arises the duty to observe scrupulous good faith in dealings between members of the social community, and the duty to share the burdens of unanticipated misfortune arising out of human relationships. Across the vast panorama of legal history, the moral advance of law has been gradual and intermittent. The need for a symbol to denote a compassionate system of justice based on the concept of
human brotherhood arises out of the lag between law and morals. There are of course many moral ideals which have not yet gained common acceptance, and many others with regard to which legal sanctions are wholly inappropriate. There are however many moral ideals which can be effectively translated into principles of law. In law as in morals, no one should be permitted to take advantage of the unwary, the needy, or the credulous or to profit from another's misfortune.

In most civil law systems, under the stimulus provided by the early reception of doctrines of humane and compassionate justice into the corpus iuris nearly two thousand years ago, the standards of conduct closely approach the standards which have been established in other social disciplines. In fully mature legal systems, in which the process of the humanization of the law is well advanced, there is less need than in imperfectly developed systems to reduce this fundamental impulse of human nature to precise expression, which explains the absence in the civil law of specifically identified principles of equity as distinguished from principles of law. In Anglo-American law, due to fortuitous circumstances of early English history, the moral lag has been accentuated and prolonged, and is still far from overcome. We have for this reason greater need than in most of the civil law systems for a body of equitable principles to constitute a guide to a humane and compassionate system of justice; but since the clashing objectives of certainty and individual justice have prevented a complete integration of legal and moral standards even in the civil law, there is need in all legal systems for specifically formulated principles as objective criteria of justice. We are accustomed in Anglo-American law to think of these principles as equity itself, but the principles are merely the expression of an impulse which converts an impersonal system of law based on the interests of society as a whole into a compassionate system of justice concerned also with the social interest in the individual life. The importance of realizing that the equitable principles are only expressions of equity and are not equity itself is because when forms of law are confused with reality, adaptation of the forms to changing needs of the place and time becomes much more difficult. The hardening of the principles of equity in nineteenth century Anglo-American law, a phenomenon which Pound has called the decadence of equity, indicates that we, like the prisoners in the cave in Plato's famous simile, may have mistaken the shadows for the reality.

The origin of equity as mitigation of strict law is important to an understanding of the nature of equity in modern times. In Roman law

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39 Plato, Republic 514a-521c.
the praetorian equity, after nearly five hundred years of administration as a separate system, merged into the corpus iuris to form a unitary legal system. In Anglo-American law the equitable system developed in the English Court of Chancery in the fourteenth century has never merged completely with the inner common law system, in spite of statutory efforts in both England and the United States over a period of more than a hundred years to bring about such a merger, but as a result of the moral progress of society the principles of equity have permeated into many common law doctrines. In the Scandinavian, Hungarian and Soviet legal systems and in the legal systems of the Orient there has been no transitional stage, and principles of equity, as soon as they ceased to be administered in the form of royal dispensation, passed directly into the main body of the law. The civil law in Europe fell heir, between the thirteenth and sixteenth centuries, to a system of Roman law in which equity and law had been completely integrated since the time of Hadrian in the second century of the Christian era. When law is divided into main and auxiliary systems, equity constitutes a component of law with characteristics which mark it as separate and apart from the main body of the law. When the rules of strict law open to receive the corrective principles of equity as an integral part of the legal structure, equity ceases to be a separate component of law and becomes a quality of the legal norms. Although in fully mature legal systems equity has ceased to exist as a separate component of law, it continues to exist as a force which gives shape to the ideal of decent and honorable conduct in the relations of man with man.

In early English law the basis of equitable relief was in general a violation of good faith or the prevention of extreme hardship resulting from the inadequacy of the ordinary rules of law to provide for just solutions in particular situations. The requirement of scrupulous good faith was based on obligations of conscience; and the concept of relief from extreme hardship beyond that which is normally incident to legal relationships was based on the canonical institution of imploratio officii iudices, which provided for relief in cases of extreme hardship. The concept of relief from hardship required a distribution of responsibility for the results of accident or mistake, since the relief to one of the parties usually entailed the relinquishment of some legal right by the other. In the contemporary stage of legal evolution, relief from hardship is increasingly provided by requiring a sharing of responsibility by the whole community. Together, good faith and relief from hardship constitute the essence of equity. From the nature of equitable
norms, which require, in their application, attention to circumstances which vary widely from case to case, flows the further principle of an individualization of justice which has spread throughout the law. Since the way courts deal with the elements of good faith and hardship is necessarily relative to the social need for certainty and to the demand for a just decision between the individuals immediately concerned, the decision as to the effect to be given to equitable considerations will vary as social or individual needs, resting respectively on reason and ideal justice, appear to the judge or jury to be of predominating importance.

The conflict between law and equity in Anglo-American law, and to a real although much less extent in the civil law, is not entirely due to accidents of history which split our law asunder, or to the deliberate and uneven pace of the ethical growth of law throughout the world. There is an inevitable and permanent clash between the legal objectives of certainty and ideal justice which has given rise, in all legal systems, to an ambivalent attitude of law toward equity, to which law is attracted by reason of the identity of equity in the general sense with justice, but which law at the same time rejects because of the inescapable conflict between the goals of certainty and ideal justice. The result of this ambivalence is that the principles of equity tend, because of what might be called a law of equitable fission, to disintegrate when they are introduced into the unfriendly environment of strict law. The deeper the penetration of the principles of equity, the greater, as their force diminishes, is the fragmentation, weakening the effectiveness of those principles in mitigating the harsh effects of strict law in particular cases. An example of restrictive application of equitable principles is the doctrine of implied warranty, which is largely confined to sales of personal property, and is applied to only a very limited extent in sales or leases of real property.\(^{40}\) Even in quasi contract, although this branch of the law is entirely of equitable origin, there is no relief in most cases of volunteered services,\(^{41}\) money paid by mistake of law,\(^{42}\) or, unless specific relief is sought against the

\(^{40}\) Tiffany, Landlord and Tenant § 86a (1910) (in leases). “The doctrine of caveat emptor so far as the title of personal property is concerned is very nearly abolished, but in the law of real estate it is still in full force. . . . Still more clearly there can be no warranty of quality of condition implied in the sale of real estate and ordinarily there cannot be in the lease of it.” 4 Williston, Contracts § 926 (rev. ed. 1936). See 7 Williston, Contracts § 926a (3d ed. 1963); Hamilton, The Ancient Maxim of Caveat Emptor, 40 Yale L.J. 1133, 1187 (1931).

\(^{41}\) Restatement, Restitution § 2, comment a (1937).

\(^{42}\) 3 Corbin, Contracts § 617 (rev. ed. 1960); Restatement, Restitution § 45 (1937); Corbin, Quasi-Contractual Obligations, 21 Yale L.J. 533, 543 & n.51 (1912).
encroacher, mistaken improvements to real property. Frequently, equitable principles are received indirectly, as in the case of the occasional acceptance of the doctrine of frustration of purpose in contracting, under a forced construction of impossibility, and in the granting of relief for unilateral mistake even where the mistake is not recognizable, under the pretext of recognizability, or of a failure of a meeting of the minds on the subject-matter of the contract.

It is because of the incomplete reception of equity that even in the civil law, in which equity and strict law have been integrated for many hundred years, it is important to preserve a clear conception of the nature of pure equity. Thus although the function of equity has changed from mitigation of the strict law in special cases, as it was in the time of Aristotle, to a humanization of standards of justice by incorporating the principles of equity into the rules of law themselves, equity continues to perform an important function even in integrated legal systems. The long history of the administration of equity in Anglo-American law in a separate inner system enables us to identify the component elements of equity more accurately than is possible in the civil law, in which a substantive fusion has obscured its equitable content. Anglo-American equity provides a catalyst by means of which the equitable content of our own and of other legal systems can be precipitated for purposes of comparison, the extent of their absorption of the principles of equity detected, their ethical evolution or "involution" determined, and cases of imperfect integration corrected. There is also much to be learned by common law lawyers from the civil law, where the elevated ethical standards of equity are applied, in most civil law systems, throughout the law.

In the course of time the equitable concepts of good faith and relief from hardship have crystallized into definite principles: that rights should be based on substance instead of form; that the law will not permit the unscrupulous to carry out their plans; that benefits obtained as a result of accident or mistake must be surrendered to those who are better entitled to them; that fully intended agreements must

43 Annot., 57 A.L.R.2d (1958); Dawson & Palmer, Cases on Restitution 552 (1938); Restatement, Restitution § 42 (1937). In several states occupying claimants' statutes have partially abolished the common law rule.


be carried out; and that unusual hardship resulting from accident or mistake must be shared, even at the sacrifice of strict legal rights, and if necessary by the whole community. In Anglo-American law an additional principle has evolved, that whenever practicable, threatened violations of rights will be prevented, violations of rights which have already occurred must be specifically repaired, and fully intended agreements will be specifically enforced, if irreparable injury would otherwise occur and if the common law remedy of damages would be inadequate to provide appropriate redress. These distinctive contributions of equity to the science of law are the principles of pure equity. Equity is an approach to justice in accordance with these specific concepts and principles.

It is necessary to interpolate at this point in our study of the nature of equity the observation that the nature of equitable remedies, which have been included in the category of fundamental principles of equity, is not entirely due to the nature of equitable doctrine. The struggle of the early chancellors to establish their court firmly in the English judicial system in the face of the jealousy of the common law courts and bar, led the chancellors to restrict the relief which was granted in the Court of Chancery to a type of remedy which the common law courts did not provide—a command to the wrongdoer to perform his duty. The remedy of specific enforcement found a perfect prototype in the procedure of the canon law, with which the early chancellors, who were almost all churchmen, were thoroughly familiar.

With regard to methods of enforcement of legal obligations, the two great master systems, Anglo-American law and civil law, exhibit a sharp cleavage. In civil law, emphasis on the concept of personal liberty has led to the rejection of coercion of the person as a means of compelling the performance of legal obligations. Although in the civil law reparation may be authorized at the wrongdoer’s expense, decrees for in-

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48 The denunciatio evangelica of twelfth century canon law provided for worldly redress as well as penitence, BARTOLUS, TRACTATUS, No. 5.6. It was enforced by excommunication, Coing, English Equity and the Denunciatio Evangelica of the Canon Law, 71 L.Q. Rev. 283 (1955). Coing concludes at page 232 that “the denunciatio evangelica was the model of early English equity.” Good conscience requires personal activity and accurate fulfillment of promises, in canon law. The influence of scholastic philosophy on English equity is discussed in Vinegradoff, Reason and Conscience in Sixteenth Century Jurisprudence, 24 L.Q. Rev. 373 (1908). Book I of the CANON LAW, Canon 80 (of the Roman Catholic Church), provides for dispensations, which are defined as “relaxation of the law.”

49 In Houzier c. Sommier, DALLOZ, 18.1.44, the plaintiff was given authority to tear down, at the defendant’s expense, a wall which interfered with the plaintiff’s use of an easement over the defendant’s property. FRENCH CIVIL CODE arts. 1138, 1143, 1144; GERMAN CIVIL CODE art. 249.
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junctions, decrees for specific performance, and imprisonment for contempt, except to an extremely limited extent in German law, are unknown. The equitable growth of the civil law seems not to have been impaired by the absence of specific enforcement in personam of legal obligations. It might therefore be not unreasonably argued that the doctrine of specific enforcement is not, viewed in the context of universal law, an essential principle of equity.

The areas in which equitable doctrines are applied in our law are not always clearly discernible, partly because the law of equitable fission affects the depth in which those doctrines have penetrated into different areas of law. It is even more difficult to discover the areas of law in which equitable doctrines have been completely accepted, because there they have become fused with common law, to be applied in all cases in which the equitable doctrines are relevant. There are areas of law in which the equitable concepts of good faith and relief from hardship have little or no relevance because neither good faith nor excessive hardship are involved; and there are some areas in which even the individualized approach of equity to justice is inappropriate because it is overcome by the social need for certainty. The presence of equitable doctrines can be best detected by superimposing the principles of equity upon the juridical norms of any legal system. Such a process will reveal that the basic equitable concept of relief from hardship is more pervasive as a fundamental principle of jurisprudence than is commonly realized. This concept is the basis of specific relief where damages are inadequate, and in many cases without regard to that factor. It is also frequently present in a wide range of rights and duties arising out of unconscionable conduct, not only that which is actually fraudulent but that which is motivated by bad faith in any degree, since the enforcement of obligations unfairly induced usually involves hardship to the person who was deceived. Where breaches of faith are present, a lesser degree of hardship is required to induce the court to grant relief. Another area

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50 There can be no imprisonment for contempt in German law where the services are unique, 2 GAUPP-STEIN, ZIVILPROSESSORDNUNG 736, 739 (1913). This has been the rule since 1900, see ROSENBERG, LEHRBUCH § 208 at 1008 (6th ed. 1954) for many illustrations. See also Jann, *Contempt of Court in Western Germany*, 8 Am. U.L. Rev. 34 (1959).


53 Dale v. Jennings, 90 Fla. 234, 107 So. 175 (1926); 4 POMEROY, *Equity Jurisprudence* § 1405(a) (5th ed. 1941).
in which the influence of the equitable concept of relief from hardship is strong is contracts which have been made by mistake, or which by reason of changes of circumstances have become extremely burdensome to one of the parties. Still another area is that in which conflicts of interest require a balancing of the hardship by distributing the burden between the parties to the contract or even, where necessary, among the whole community. The equitable insistence on substance over form is a manifestation of both the hardship concept and the concept of good faith. Where hardship is not considerable, the requirement of certainty controls. In the case of extreme hardship, equity affords relief through an enforced sharing of the consequences of misfortune. The equitable requirement of good faith is almost equally pervasive, affecting problems arising, for example, in the enforcement of contracts, adverse possession in many jurisdictions,

54 Corbin, Contracts §§ 608-12 (1950).
60 An excellent example of the requirement of sharing the burdens of the consequences of unilateral mistake in contracting is the "negative interest" doctrine of damages, first conceived by Jhering in 1860; according to which a promisee, in case of rescission by the promisor for his unilateral mistake, is protected against loss, although he will not reap the profits of his bargain. "Cupla in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Vertragen." Jhering, 4 Jährbuc. 118 (1861). Jhering's theory is explained in Smith, Four German Jurists, 12 Pol. Sci. Q. 21, 43-48 (1897). The doctrine is in force in Louisiana, La. Civ. Code Ann. art. 1837 (West 1952); Argentina (see Machado, Comentarios 121-22) (1875); Austria, Austrian Civil Code art. 878; China, Chinese Civil Code art. 91; France, Josserand, Cours de droit civil positif francais 72(2) (2d ed.); Germany, German Civil Code art. 122; Italy, Italian Civil Code art. 1223; Switzerland, Swiss Code of Obligations art. 26 (see ATF 64 II9, JT 1939, 158). See Goodrich v. Lothrop, 94 Cal. 56, 29 Pac. 329 (1892); Youngblood v. Daily & Weekly Signal Tribune, 15 La. App. 379, 131 So. 604 (1930); Cal. Code Civ. Proc. § 3408. See generally McClintock, Mistake and the Contractual Interests, 28 Minn. L. Rev. 460 (1944).
58 In Kleinberg v. Batett, 252 N.Y. 236, 169 N.E. 289 (1929), a vendor was denied specific performance of a contract to buy land because he failed to reveal to the purchaser the presence of an underground watercourse, although the purchaser, the court held, was not entitled to recover his down payment. Papinian on an almost precisely similar state of facts reached the opposite conclusion as to the right to recover the down payment, Digest 19:1:41.
59 Jasperson v. Scharnikow, 150 Fed. 571 (9th Cir. 1907); see Daily v. Boudreau, 231 Ill. 228, 83 N.W. 218 (1907); Van Valkenburgh v. Lutz, 304 N.Y. 95, 106 N.E.2d 28 (1952).
interference with contractual relationships, imperfect performance of contractual obligations, encroachment upon property of another, and fiduciary obligations.

Reason, Justice and the Polarity of Law

There is inherent in all law a polarity which arises out of the un-ending struggle for supremacy between the need for stability of rights and institutions, and the need for humane solutions of controversies in accordance with considerations of individual justice. Stability is attained through norms which allow in their application only a minimal amount of judicial discretion. The humane element in law operates through norms which preclude formulation in impersonal moulds and leave a considerable margin for discretion. In the beginnings of law it is reason which determines impersonally the shape of the basic norms of social order. As law becomes humanized in the course of the moral progress of mankind, justice requires that legal norms be not only reasonable but also humane; and in

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60 Carmen v. Fox Film Corp., 269 Fed. 928 (2d Cir. 1902).
61 Restitution in the case of incomplete performance depends on whether the builder's breach was wilful. RESTATEMENT, CONTRACTS § 357 (1932); see Note, 45, COLUM. L. REV. 72 (1945).
63 2 SCOTT, TRUSTS § 170 (2d ed. 1958); NEWMAN, TRUSTS 397 (2d ed. 1955); see Scott, The Trustee's Duty of Loyalty, 49 HARV. L. REV. 521, 539 (1936).
64 Equity is "a reasonable and humane approach to human relations." Wen-Yen Tsao, Equity in Chinese Customary Law, in ESSAYS IN HOMOR OF ROSCOE POUND 21, 22 (Newman ed. 1962). Aristotle said that "in whatever cases one is bound to have a fellow feeling, these are all cases of equity." Rhetoric, Bk. 1, c. 13. SCHWEITZER, OUT OF MY LIFE AND THOUGHT 126 (1933), speaks of "the universal ethic of the feeling of responsibility." "Perhaps we shall even find at times that when talking about justice the quality we have in mind is charity, this though the one quality is often contrasted with the other." CARDozo, The Growth of the Law 87 (1924). Charmont, L'Abus du droit, 1 REV. TRIMESTRELIUE DE DROIT CIVIL 113, 121 (1802) says that "the frontiers, always provisional, with the aid of which we have tried to separate charity, justice and law, have been once more displaced." MURRHEAD, ELEMENTS OF ETHICS § 88 connects justice with charity. Matthew 23:23, addressing the scribes (lawyers) and Pharisees, "[Y]e . . . have omitted the weightier matters of the law, judgment, mercy, and faith." Harno, The Precepts We Live By, 2 S.D.L. Rev. 19, 20 (1957), refers to "the realm which recognizes the sway of duty, of fairness, of honest dealing between men, of sympathy, of taste, and of the spirit." The classification seems to make explicit what Aristotle may have meant by "fellow feelings." Although Harno considers such obligations to be unenforceable, he concedes that the domains of obedience to the unenforceable and of obedience to law are interrelated and complement each other. Some
modern times, reason and justice together shape the legal norms. The contrast between reason and justice is of course far from precise. Where social interests are particularly important, justice will often assign to those interests predominating weight, even though some individual interests may remain unfulfilled, and reason includes humanitarian objectives, based on the ascertained moral sense of the community, which may not be in accordance with the other interests of society. The transition from subjectivity to objectivity is perhaps the crowning achievement of law, and the necessity for limitations on the discretion of judges creates the problem of establishing a balance between certainty and ideal justice. Although the nature of equitable concepts is such as to resist rigid classification, this does not prevent the principles of equity from establishing an equilibrium, so far as this is possible, between certainty and a humane approach to justice. The fact that norms cannot be verified empirically does not impair either the validity or the workability of moral postulates, the norms remain valid even though they are subject to modification as they are tested by experience. The gradual humanization of law has brought about a change in its structure from rigid rules to broader and more flexible principles. The settled principles which are derived from the basic concepts of equity would seem to provide an adequate guide to judicial objectivity even in an individualized approach to justice.

In our contemporary culture we can no longer speak of strict law

of these considerations, particularly those of duty, fairness and honest dealing between men seem to fall within the proper province of law, and are so regarded in equity.


66 “Most of the equitable or discretionary ingredients which are constantly found in legal systems and which are based on this primary sense of justice are inherent in the average moral sense of the community.” Id. at 405.

67 “Thought does not survive without symbolic concepts. The absence of norms which can be treated empirically does not impair the validity of moral postulates.” BRONOWSKI, SCIENCE AND HUMAN VALUES 48-51 (1955). Einstein has observed that modern physics is impossible unless concepts going beyond observed facts are introduced and tested by their deductive consequences. The World as I See It 35 (1935).

68 7 BACON, Works 325 (Spedding ed. 1839). See generally 3 POUND, JURISPRUDENCE 513-57 (1959); Patterson, The Case Method in American Legal Education: Its Origins and Objectives, 4 J. LEGAL ED. 1, 15 (1951), referring to the “amazing fertility” of basic legal concepts which have shown their worthiness to survive; he adds that “despite twenty-five years or more of washing legal concepts in the cynical acid of legal realism American courts continue to employ many surviving and pervasive concepts in their opinions.” On the regulae or maxims of equity consult Stein, The Digest Title, De diversis regulis iuris antiqui and the General Principles of Law, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 1 (Newman ed. 1962).

in the sense of law devoid of moral content. The truth is that we have no terms corresponding, in the context of modern jurisprudence, to the Greek "νόμος," meaning law applied impersonally, and "ἐμπειρεῖα," which we translate as equity, but the literal meaning of which is clemency. Throughout private law except in a few areas of property law and commercial law, and in public law other than rules of criminal law and some aspects of administrative law, the term strict law as the antithesis to equity has become a legal anachronism. In the following discussion the word "reason" will be used to refer to those legal norms in which primary emphasis is directed to the social objective of certainty rather than to individual justice.

How Equity Intervenes in Legal Norms

There are legal norms which rest exclusively on reason; there are other legal norms which rest on both reason and equity; and there are, in Anglo-American law and in French administrative law, still other legal norms which rest on equity alone. In the first category, where reason is the sole criterion, equity, other than in the general sense of what is fair and just, has no place. In the second category, legal norms which rest on both reason and pure equity, in fully mature legal systems the equitable principle loses its separate identity and becomes a universal constant of the legal norm, to be applied wherever the concepts of equity are relevant. In the course of this integration, rigid rules are replaced by principles into which have been built the equitable concepts of good faith and relief from hardship. Throughout the civil law and throughout some branches of Anglo-American law, what were formerly principles of equity have become fully incorporated into the legal norms. This is also true in a few limited areas of Anglo-American law, for example in the doctrine of marketable title. There are however large areas of Anglo-American law in which equitable principles do not combine with legal principles to form universal norms applicable in all appropriate situations. In general in Anglo-American law the application of the principles of pure equity is confined to suits for specific relief. It is only in Anglo-American law and in French administrative law, where the reception of equity is still in the formative stage, that we find norms of the third category, those which are exclusively equitable; for example, the Anglo-American doctrines of equitable

servitudes and equitable waste. In a fully mature legal system this third category of legal norms which rest on equity alone, disappears, since in such systems the concepts of equity have become fully incorporated into the legal norms. An example of complete integration is the broad concept of unfair conduct as that concept exists in most civil law systems. In this concept the scrupulous standards of good faith which are required in equity are applied even in situations in which, in Anglo-American law, only the less exacting common law standards are applied.

The effect of the principles of pure equity on the common law can be detected most clearly by tracing the way in which they enter into legal doctrines. This effect takes place in three different ways. Sometimes the principles of equity unite with common law principles to become universal constants throughout the whole range of application of the legal doctrine. Sometimes, in the case of legal doctrines which rest in part on common law principles and in part on principles of equity, other principles of equity intervene as variants of the legal doctrine, to replace the equitable constant at points in the application of the legal doctrine at which those other principles of equity become relevant. Similarly in the case of doctrines which rest exclusively on common law principles, the principles of equity sometimes intervene as variants of the legal doctrine. A few examples of equitable modifications of common law doctrines in different branches of the law will illustrate the interrelation of principles of equity and principles of common law.

An example of a doctrine in which a principle of equity unites with a common law principle to become a universal constant throughout the whole range of application of the doctrine is the quasi-contractual obligation to restore property acquired in bad faith or by accident or mistake, or, if rightfully acquired, retained in bad faith. In the application of this doctrine, the principles of equity are applied in nearly all cases which arise in this area of law. A consequence of this integration is that the appropriate principles of equity are applied in actions for damages as well as in suits for specific relief. Equity is also a universal constant throughout the entire range of the doctrine of fiduciary responsibility in the law.

73 Austrian Civil Code art. 879; French Civil Code art. 1116; German Civil Code art. 138; Italian Civil Code art. 1337; Scandinavian Civil Code art. 31; Swiss Code of Obligations art. 21.
74 Ames, Law and Mores, 22 Harv. L. Rev. 97, 107 (1908).
of trusts,\textsuperscript{75} in which the law applies, in actions for damages, the same norms as are applied in suits for specific relief. Other doctrines of narrower scope in which pure equity assumes throughout the entire range of a doctrine the quality of a universal constant are the obligation, in the law of sales, to mitigate damages;\textsuperscript{76} priorities in the law of liens;\textsuperscript{77} the obligation of a landlord, in some jurisdictions, to make reasonable efforts to re-let demised premises in cases in which the tenant has abandoned his lease;\textsuperscript{78} accession and confusion, where the controlling considerations are the good faith of the converter and the hardship he would sustain if he were required, under some circumstances, to relinquish the product of his labor;\textsuperscript{79} contribution and exoneration in the law of suretyship;\textsuperscript{80} impossibility of performance;\textsuperscript{81} fraud;\textsuperscript{82} failure of consideration;\textsuperscript{83} and rescission for innocent misrepresentations in contract law.\textsuperscript{84} All of these doctrines originated in equity but have been completely accepted at law, the extent of the acceptance varying occasionally in different jurisdictions.

An example of a doctrine of contract law which rests on both common law and equitable principles and in which other principles of equity intervene as variants of the legal norm is the doctrine of \textit{pacta sunt servanda}, dealing with the enforceability of promises. This doctrine, which is based in part on common law principles and in part on the equitable duty to perform promises in good faith, applies, in the absence of equitable defenses, to all promises which create legal responsibility. In the absence of equitable defenses, there is hardly likely to be any reason for shifting to the adversary party

\textsuperscript{75} \textit{Bogert, Trusts and Estates} §§ 484-93, 543-44, 612 (1935); \textit{Scott, Trusts} § 170.25 (2d ed. 1956).

\textsuperscript{76} \textit{Farish Co. v. Madison Dist. Co.}, 37 F.2d 455 (2d Cir. 1930) (L. Hand, C.J.); \textit{McCormick, Damages} § 173 (1935); \textit{Williston, Sales} §§ 589, 599(g) (rev. ed. 1948).

\textsuperscript{77} See Whiteside, \textit{Priorities Between Chattel Mortgagee or Conditional Seller and Subsequent Lienors}, 10 \textit{Cornell L.Q.} 331 (1925).

\textsuperscript{78} \textit{Wilson v. Nat'l Ref. Co.}, 126 Kan. 139, 266 Pac. 941 (1928); \textit{Novak v. Fontaine Furniture Co.}, 84 N.H. 93, 146 Atl. 525 (1929).


\textsuperscript{80} See \textit{Stearns, Suretyship} 477-99, 508 (3d ed. 1922).

\textsuperscript{81} \textit{Texas Co. v. Hogarth Shipping Co.}, 256 U.S. 619 (1921); \textit{Patch v. Solar Corp.}, 149 F.2d (7th Cir.), \textit{cert. denied}, 326 U.S. 741 (1945).

\textsuperscript{82} \textit{3 Pomeroy, Equity Jurisprudence} § 910 (5th ed. 1941).

\textsuperscript{83} \textit{Anderson v. Yavorski}, 120 Conn. 390, 181 Atl. 205 (1935).

\textsuperscript{84} \textit{5 Williston, Contracts} § 1500 (rev. ed. 1938). In England rescission is not allowed where the contract has been executed, \textit{Seddon v. North E. Salt Co.}, [1905] 1 Ch. 326, 322.
or to the public any part of the responsibility for the loss or damage, and the decision rests on both reason and equity. When, however, circumstances are present involving failure of presuppositions of a contract in cases such as unilateral mistake or frustration of purpose, or in cases of hard bargains, unconscionable conduct less than fraud, or contracts not fully performed by the plaintiff, the equitable principle that good faith requires the performance of promises ceases to be a constant of the legal norm. Although at this point the common law would continue to enforce the promise, other principles of equity come into play as variants of the norm of enforcement and require relief from the obligation to perform, where special circumstances of the foregoing kinds are present. It is only in Anglo-American law, in which the principles of equity have been as yet only imperfectly received, that a distinction is drawn between the norms of common law and the norms of equity under circumstances in which equitable defenses against enforcement of promises are present. In Anglo-American law the foregoing defenses are generally rejected in actions for damages. An example of imperfect reception of equity in the civil law is the provision of the Portuguese Civil Code to the effect that error in motive constitutes ground for rescission of a contract only if the motive, although known to the adversary party, was expressly referred to in the contract. It is to be expected that such equitable defenses, now largely confined in Anglo-American law to suits for specific relief, will be extended to actions for damages, as is the case throughout most of the civil law systems.

An example of a doctrine of the law of torts which rests exclusively on common law principles but in which principles of equity intervene under circumstances which require the application of such principles is the doctrine of liability for harm caused by conduct of the defendant. Under the traditional formula of tort liability, at any rate since very early times, the defendant’s liability exists only if he was at fault. Modern law is beginning to recognize that the

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86 Authorities cited note 55 supra.
87 Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948).
88 Authorities cited note 53 supra.
89 Authorities cited note 61 supra.
90 Portuguese Civil Code arts. 659, 660.
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Public interest may require that responsibility for harm caused by potentially harmful agencies or property may be attached to conduct without fault. Where a choice of the incidence of responsibility is possible, responsibility is attached to the enterprise which, by making the risk part of the cost of doing business, can best distribute the burden among the community through an increase in the price of the goods or services, an application of the equitable principle of risk-sharing. The principle of strict liability, completely received into the theory of delictual obligations in the civil law, has received only partial acceptance in Anglo-American law. Another example of a doctrine which rests exclusively on common law principles is the category of rights arising out of ownership of property. Such rights are unqualified up to the point at which the public interest is violated or threatened, or at which private interests arise under circumstances such as adverse possession, accession where property has been greatly increased in value by a finder, or acts of nuisance which require a sharing of responsibility for

92 Patterson, The Apportionment of Business Risks Through Legal Devices 335, 358 (1924); Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1120 (1960).

93 In Goldberg v. Kolsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), it was held that an airplane manufacturer's implied warranty of fitness of the airplane ran in favor of a passenger despite the absence of privity of contract. The action was dismissed, however, against the manufacturer of the altimeter, the instrument the failure of which had caused the accident. The court said that it was unnecessary to so extend the doctrine of strict liability as to hold the manufacturer of the component part which caused the accident; that "adequate protection is provided for the passengers by casting in liability the airplane manufacturer . . . ." Id. at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595. Burke, J., dissenting, pointed out that special insurance is readily available to passengers. "The risk . . . becomes part of the cost of doing business and can be effectively distributed among the public through insurance or by direct reflection in the price of the goods or service." Id. at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 598. Burke, J. thought however that this should be done by the legislature. See Patterson, The Apportionment of Business Risks Through Legal Devices, 24 COLUM. L. REV. 335, 358 (1924); Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1120 (1960).

94 "Every act which causes injury to another binds the person by whose fault the damage occurred, to repair such damage." FRENCH CIVIL CODE art. 1382. See also ibid. art. 1384; GERMAN CIVIL CODE art. 823; ITALIAN CIVIL CODE art. 1151, SWISS CODE OF OBLIGATIONS art. 41.


In all these situations, equitable principles may require a qualification of legal rights and obligations.

When principles of equity unite with principles of common law to form legal norms which are the basis of either causes of action or defenses, the effect is to introduce into the law, without regard to the nature of the remedy which is sought by the plaintiff, doctrines which may lead to different results than if such doctrines were not applied. Putting the matter differently, this result comes about where the equitable element in the norms upon which the cause of action, or the defense, is based, has been accepted as a legal cause of action or defense. There is however a large area of Anglo-American law, actions in which the only remedy sought or available is damages, in which the principles of equity do not always unite with common law principles. The result is that in actions for damages the principles of equity are not applied in all cases in which the basic equitable concepts of good faith and relief from hardship are relevant. Our jurisprudence has displayed remarkable ingenuity, although the results have been highly undesirable, in curtailing the extension of equitable doctrine. The basic equitable concept of good faith has been divided into fraud and unconscionable conduct short of fraud, and in most actions for damages only flagrant bad faith is condemned. The basic concept of relief from hardship has been divided into hardship for which damages constitute “adequate” compensation, and hardship which cannot be adequately compensated in that manner. Only where the hardship would be irreparable are equitable principles ordinarily applied. By another even more ingenious operation, which has been successfully performed only in the legal laboratories of the English speaking part of the world, all law has been divided into actions for damages and suits for specific relief, an operation which, since equitable principles are generally reserved for only one such type of action, actions for specific relief, severely limits the scope of those principles. The reasons for all these examples of judicial surgery, which are to be found in the political history of the middle ages and the problem of making the English Court of Chancery a viable part of the judicial system, do not concern us now. The result is, however, that the benefit of the system of elevated moral principles which constitute the supreme contribution of equity to law has been withheld from by far the

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largest number of cases which come before the courts, those in which the only remedy sought or available is damages, and is reserved for a relatively minor segment of our law, suits in which the circumstances afford the opportunity for specific relief. In the greater part of our law we give preference to lower over higher moral standards, and to the less effective remedy, damages, over the more effective method of enforcing rights, specific relief. These are some of the anomalies of Anglo-American equity which foreign scholars find it hard to understand, and which invite the attention of the legal profession in the United States and in England to the solutions which have been reached in other legal systems. There are good reasons in many situations for granting only equitable, or only legal relief as the case may be, or for giving or denying controlling effect to an equitable defense. There should be a better reason for determining the relevance of equitable considerations in deciding the merits of a cause of action, or of a defense, than the type of relief which is sought by, or is available to, the plaintiff. If the ethical standards upon which the principles of pure equity are based are proper factors in deciding cases in which specific relief is requested, there is usually no good reason why those standards should not be regarded as equally relevant in cases in which the plaintiff asks only for damages. The reason why equitable principles were restricted, in the distant past, to suits for specific relief, was not that equitable principles were thought to be relevant only in suits for specific relief, but because only such suits could be brought in the courts of equity, which were the only courts in which those principles were applied. The assumption that the principles of equity are relevant only in suits for specific relief, and are not relevant in most actions for damages, is entirely unwarranted by the facts of legal history. The consequence of the assumption is that we are allowing substantive rights and obligations to be decided on the basis of the nature of the remedy which is sought or available; although everyone agrees that the difference in remedy has no bearing whatever on the relevance of equitable principles to the decision of the case, and although many of the major procedural reforms in the United States and in the British Commonwealth for more than a century have been directed toward the abolition of the distinction.

Conclusion

It is evident that the effect of the principles of equity on legal norms is to transform a relatively impersonal system of law based
primarily on reason, into a humanitarian system in which considerations of decent and compassionate conduct play an important role. Although it is difficult to weigh the effect of such imponderables, there seems to be little reason to doubt that in the unending process of the humanization of the law, equity is, in the words of Jose Puig Brutau, one of the world’s great comparatists, “one of the names under which is concealed the creative force which animates the life of the law.”

The halting and imperfect reception of the principles of equity in Anglo-American law is not because we are unaware that they exist. Their presence and nature have been demonstrated throughout the many hundred years during which equity has constituted a separate inner system in Anglo-American jurisprudence. In almost all legal systems other than our own, substantially identical principles, except for the principle of enforcement in personam, are applied in all cases in which they are relevant, as is also true in parts of our own legal system. No instance of acceptance in Anglo-American law of the principles of equity has ever been reversed except in the field of quasi contract, where modern law is occupied in regaining the lost ground. Events of remote history which gave rise to a dual system of law and equity are allowed to continue to impress on our legal system a dual standard of morality. As Lord Radcliffe has recently reminded us, “every system of jurisprudence needs . . . a constant preoccupation with the task of relating its rules and principles to the fundamental moral assumptions of the society in which it belongs.”

If we are to maintain a measure of harmony between the moral progress of mankind and the moral progress of the law, the law cannot ignore the moral standards which are the enduring basis of our civilization.

Out of the mists of history emerges the figure of a shepherd who dreamed, in a time of moral regression, of human brotherhood. There is surely some relation between his dream and the fact that he was, according to the sacred writings of his people, the first to recognize that when equity cannot enter, justice stands afar off. The

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“And judgment is turned away backward, And justice standeth afar off; For truth is fallen in the street, And equity cannot enter.” Isaiah 59:14 (King James).

In the Soncino edition of the book of Isaiah, the Hebrew word “nikochah” in 59:14 is translated by the word “uprightness,” in contrast to its translation in the King
problem which was revealed to the great unknown Isaiah continues to confront modern jurisprudence. The main obstacle to the substantive fusion of equity and law is our failure to recognize that equity has become, in the course of the march of the human spirit, an integral part of justice. There can be no complete or accurate picture of the structure of law unless its equitable content is taken fully into account; nor can the law fulfill its function of nourishing and enriching the growth of the human spirit unless its equitable elements are fully committed to the task.

James version of the bible by the word "equity"; see Isaiah, Soncino Books of the Bible 290 (1949). The translation of the verse in the Soncino edition is as follows:

"And justice is turned away backward,
And righteousness standeth afar off;
For truth hath stumbled in the broad place,
And uprightness cannot enter."

102 RADCLIFFE, op. cit. supra note 100, at 64.